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IN THE

Supreme Court of the United States

GENERAL COMMITTEES OF ADJUSTMENT GO-386 and GO-245 OF THE UNITED TRANSPORTATION UNION,

and

UNITED TRANSPORTATION UNION,

Petitioners,

v.

THE BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Multi-employer bargaining (which in the rail industry is called "national handling") is a permissible form of bargaining under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and, indeed, has been an accepted form of bargaining in the rail industry for more than a half-century. This case presents the following questions concerning multi-employer bargaining under the Railway Labor Act:

1. Is multi-employer bargaining under the Railway Labor Act entirely consensual, as the United States Courts of Appeals for the Sixth and Eighth Circuits have held, relying upon the right that Section 2 Third of the Act, 45 U.S.C. § 152 Third, gives to a party to designate its bargaining agent free from interference by the other party, or may that form of bargaining be obligatory as the United States Court of Appeals for the District of Columbia Circuit has held in this case, relying upon the duty imposed upon carriers and employees by Section 2 First of the Act, 45 U.S.C. § 152 First, "to exert every reasonable effort to make and maintain agreements"?

2. If the District of Columbia Circuit is correct and national handling may be obligatory, may a federal court, in construing the duty imposed by Section 2 First "to exert every reasonable effort to make and maintain agreements[,]" compel multi-employer bargaining because, objectively reviewing the bargaining history of the parties, that bargaining is a "reasonable effort," even though the party being compelled is acting in good faith in opposing national handling, since bargaining through the agent it is being compelled to accept as its negotiator will prevent it from insisting upon the resolution of issues that are important to it but not to others bargaining through that same negotiator?

PARTIES

Petitioners, who were appellees in the Court of Appeals, are:

General Committee of Adjustment GO-386 of the United Transportation Union;
General Committee of Adjustment GO-245 of the United Transportation Union; and
United Transportation Union.

General Committee of Adjustment GO-291 of the United Transportation Union, which was a plaintiff and appellee below, merged with petitioner GO-386, effective Dcember 1, 2002.

Respondents, who were appellants in the Court of Appeals, are:

The Burlington Northern and Santa Fe Railway Company;
Consolidated Rail Corporation;
CSX Transportation, Inc.;
Kansas City Southern Railway Company;
Norfolk Southern Railway Company;
Union Pacific Railroad Company;
Manufactures Railway Company;
Peoria & Pekin Union Railway Company;
Portland Terminal Railroad Company;
Terminal Railroad Association;
Utah Railway Company;
Winston Salem Southbound Railway Company; and
Robert F. Allen, in his capacity as Chairman of the National Carriers' Conference Committee

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Petitioners,

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Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioners, General Committees of Adjustment GO-386 and GO-245 of the United Transportation Union[1] and the United Transportation Union (UTU), respectfully request that this Court issue a writ of certiorari to the United States Court

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[1] Throughout this litigation, there was a third Committee participating with General Committees GO-386 and GO-145. However, effective December 1, 2002, that third Committee, General Committee GO-291, merged with petitioner GO-386, with petitioner GO-386 being the surviving Committee.

of Appeals for the District of Columbia Circuit to review the judgment of that court in *General Committee of Adjustment GO-386 v. Burlington Northern and Santa Fe Ry.*, 295 F.3d 1337 (D.C. Cir. 2002), in order to resolve a conflict among the circuits on important issues concerning the proper interpretation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the role of federal courts in enforcing the commands of that Act.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reproduced in Appendix A to this petition, is reported at 295 F.3d 1337. The opinion of the United States District Court for the District of Columbia, whose judgment the court of appeals vacated, is reported at 141 F.Supp.2d 49, and is reproduced as Appendix B to this petition, beginning at 8a.

JURISDICTION

The decision of the court of appeals was issued on July 19, 2002. Petitioners filed a timely petition for rehearing *en banc* on August 19, 2002, which was denied by the court of appeals on September 9, 2002. App. D at 28a. The petition to this Court is timely under 28 U.S.C. § 2101(c). Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the proper interpretation and application of Sections 2 First and 2 Third of the Railway Labor Act, 45 U.S.C. §§ 152 First, and 152 Third, which are reproduced in Appendix E to this petition, beginning at 30a. Sections 1 Sixth, 2 Second, and 6 of the Railway Labor Act, 45 U.S.C. §§ 151 Sixth, 152 Second, and 156, are also relevant and they, too, have been reproduced in Appendix E.

STATEMENT OF THE CASE

This petition asks the Court to resolve a conflict among the circuits concerning whether a party to collective bargaining under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, may be compelled to participate in multi-employer bargaining, which in the rail industry is termed "national handling"–*i.e.*, bargaining for a "national contract" through a "national bargaining representative."[2] According to the United States Courts of Appeals for the Eighth and Sixth Circuits in *ARASA v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *cert. denied*, 498 U.S. 809 (1990), and *UTU v. Grand Trunk Western R.R.*, 901 F.2d 489 (6th Cir.), *cert. denied*, 498 U.S. 815 (1990), participation in "national handling" is entirely consensual and turns on the right which Section 2 Third of the Act, 45 U.S.C. § 152 Third, gives a party to decide, without coercion by another party, whether to allow the national negotiator to negotiate on its behalf. However, according to the United States Court of Appeals for the District of Columbia Circuit in the case at bar, relying upon its earlier decision in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968), national handling may be obligatory, depending on whether the district court concludes from an objective assessment of the parties' past bargaining practices that such bargaining constitutes a "reasonable effort," which the court may then compel in enforcing the duty imposed by Section 2 First of the Act "to exert every reasonable effort to make . . . agreements . . . ." 45 U.S.C. § 152 First. Resolving this conflict among the circuits also presents the issue left open in *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 579 n.

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[2] National handling today is a misnomer, for during the last two rounds of bargaining, the first which began in 1994 and the second in November 1999, three of the eight Class I railroads (*see*, 49 C.F.R. § 1201.1-1(a)) bargained individually–*i.e.*, "locally"–and *not* through the NCCC. Joint Appendix in D.C. Cir. Nos. 01-7068 & 01-7069 (JA) at 312, ¶ 12.

11 (1971), whether federal courts, in enforcing Section 2 First, may require more of the parties than avoidance of "bad faith."

This litigation began in November 1999, shortly after respondent Burlington Northern and Santa Fe Railway Company (BNSF)[3] and twenty-six (26) other railroads with which the BNSF was bargaining through the National Carriers' Conference Committee (NCCC),[4] served notice upon the UTU under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, that they wished to negotiate on a multi-employer basis changes to existing collective bargaining agreements which covered employees represented by the UTU. Petitioner UTU informed the carriers that the union's National Negotiating Committee would bargain on a "national basis" on behalf of those UTU Committees which had elected to bargain through that negotiating committee,[5] but petitioner UTU also informed the NCCC that the

---

[3] Respondent BNSF, one of eight remaining Class I railroads in this country, is the product of mergers, particularly during the past thirty-two years. It operates a 33,500 mile rail system in the western two-thirds of the United States, employing a work force of more than 44,500 employees. JA at 1053.

[4] The NCCC is an association made up primarily of the chief labor relations officers of Class I railroads engaged in national handling. JA at 1052, pp. 13-14. A carrier which wishes to bargain "nationally" must expressly authorize the NCCC to bargain on its behalf by providing the NCCC with a "power of attorney." JA at 310-12; 1052, p. 15.

[5] Article 91 of the UTU's Constitution provides that the Chairpersons of the General Committees for the rail lines in the United States are to form an Association and if a majority of the Chairpersons in that Association authorize a "concerted movement[ ] relating to wages, rules, and working conditions" (JA at 261, Art. 91), the UTU's chief International officers are to appoint a negotiating committee to "assist in the prosecution of the wage-rules movement as directed by the International President." *Id.* General Committees that do not wish to participate in the concerted movement may be excused by majority vote of the association and approval of the International President. *Id.*

negotiating committee would not be bargaining on behalf of those Committees which had elected *not* to bargain through the UTU's National Negotiating Committee, such as GO-386, GO-245, and GO-291.[6] On November 24, 1999, the BNSF and eleven other railroads bargaining through the NCCC filed suit against petitioner UTU in the United States District Court for the District of Columbia, seeking to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.* As relevant here, the railroads sought a declaratory judgment and an injunction to require the UTU to bargain with the NCCC on behalf of all employees the UTU represented on the carriers which had selected the NCCC as their negotiator.[7]

On January 7, 2000, three of the UTU General Committees of Adjustment that had elected not to participate in national

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[6] Although the UTU is the "duly designated" representative of several crafts or classes of operating employees on our nation's railroads, the UTU's Constitution delegates to subordinate bodies within the UTU, known as General Committees of Adjustment, "the authority to make and interpret agreements with representatives of transportation companies covering rates of pay, rules, or working conditions . . . ." JA at 259, Art. 85. Generally, the authority of each General Committee is limited to a specific railroad or railroads and its or their agreements. This bargaining structure is typical in the rail industry. Since all Class I railroads today are the products of mergers where the parties have generally agreed to preserve the basic collective bargaining agreements, called "schedule agreements" (JA at 103), the preservation of the basic agreement usually preserves the Committee as well. Thus, there are typically more than one General Committee for each of the larger unions on each Class I railroad. For example, prior to the merger of GO-386 and GO-291, there were 11 UTU General Committees on the BNSF, each with exclusive authority for specific portions of the BNSF system.

[7] Respondents also sought declaratory and injunctive relief to require petitioner UTU to bargain "system-wide" on the BNSF. The court of appeals did not reach that issue in its disposition of this case, finding that it was "not yet ripe for decision" (App. A at 5a), and, therefore, this petition does not address that issue.

handling, namely petitioners GO-386 and GO-245, along with GO-291, filed suit against the BNSF and against the NCCC through its chairman, Robert F. Allen. The three Committees, which represented over three thousand of the eleven thousand BNSF employees who have selected the UTU as their collective bargaining representative, invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) to enforce the Railway Labor Act, seeking declaratory and injunctive relief to require the BNSF to bargain with the Committees over the changes that the BNSF had proposed be made to the collective bargaining agreements that the Committees have been designated by the UTU to make and maintain with the BNSF.[8]

The three Committees explained to the district court that they had decided not to participate in national handling because the contract changes that were important to the employees covered by the agreements they administered differed from the concerns that the other Committees wished to address in the planned concerted movement, and that to achieve a satisfactory resolution on their "local issues," they needed the flexibility to trade economic considerations for quality of life issues. JA at 216-18, ¶ 19. This, in turn, required that all issues be bargained together in a "local" setting. *Id.*

Significantly, there is no genuine dispute in this case over the fact that the three Committees, by declining to participate

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[8] The UTU's National Negotiating Committee and the NCCC reached a tentative agreement in September 2000 (JA at 591, ¶ 30), but questions arose as to the terms of the agreement. Those questions were resolved by May 2002, and the tentative agreement was ratified by the affected membership in August 2002. However, the membership of the three Committees did not participate in that ratification process, and, thus, another question that must be resolved by this litigation is whether the national agreement, as respondents assert, applies to the employees for whom the three Committees bargain.

in national handling, are not acting with a "desire not to reach an agreement" on the changes that the BNSF, through the NCCC, proposed be made to the schedule agreements those Committees make and maintain. Rather, as the BNSF's Vice President of Labor Relations, who is also the BNSF's representative on the NCCC, testified at his deposition, he had discussed with the three General Chairpersons their reasons for not agreeing to participate in national handling, and he did not conclude from those discussions that they were acting in bad faith. JA at 381, pp. 78-79. Additionally, the BNSF and the NCCC knew before the carriers served their Section 6 notice to begin the 1999 round of bargaining that the three Committees had not agreed to participate in national handling. JA at 541-42.

The General Committees' case was consolidated with the suit that the BNSF and the other carriers had brought against the UTU, and all parties cross-moved for summary judgment. On March 28, 2001, the district court, by United States District Judge Emmet G. Sullivan, issued a Memorandum Opinion and Order granting the motions by the UTU and the three Committees for summary judgment. With respect to the issue raised by this petition–whether multi-employer bargaining may be compelled–the district court was faced with the contention by the carriers that the court's analysis was controlled by the circuit's decision in *Atlantic Coast Line*, in which the court of appeals, although rejecting the claim that national handling should be compelled in that case, stated as follows concerning the issue (383 F.2d at 229; emphasis added):

> What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. *Whether it is*

> *also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. . . .*

Petitioners, on the other hand, relied in part upon the decision by this Court in *Chicago & North Western Ry. v. UTU*, 402 U.S. 570 (1971), to argue that the license that *Atlantic Coast Line* appeared to give district courts to intrude into the collective bargaining process must be read in the light of this Court's admonition that, in cases enforcing the duty imposed by Section 2 First of the Act, "great circumspection should be used in going beyond cases involving 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." 402 U.S. at 579, n. 11. Petitioners also argued that this case was not controlled by *Atlantic Coast Line* because the right that Section 2 Third gives each party to designate its bargaining agent was involved in this case but was not considered by the *Atlantic Coast Line* court. Section 2 Third, as it applies to the dispute over national versus local bargaining, petitioners noted, was considered and found to be controlling by every court outside of the District of Columbia Circuit that has addressed this dispute, such as the Eighth Circuit in *ARASA v. Soo Line R.R.*, *supra*, and the Sixth Circuit in *UTU v. Grand Trunk Western R.R.*, *supra*.[9]

Recognizing that "the identity of the [bargaining] representative and the structure of the bargaining cannot always be separated . . . . [for in] some cases, such as these, one necessarily effects the other" (App. B at 20a), the district court concluded that what was "at issue in these cases is the

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[9] *See also, UTU v. Chicago & Illinois Midland Ry.*, 731 F.Supp. 1336 (C.D. IL 1990), and *UTU v. Illinois Central R.R.*, 731 F.Supp. 1332 (N.D. IL 1990).

employees' method, through UTU, of designating their own bargaining representative." *Id.* This meant that Section 2 Third, as applied by the Eighth and Sixth Circuits, was controlling. App. B at 20a-21a. But that did not mean that Section 2 First was irrelevant, for, as the district court explained (*Id.*):

> Both parties could behave reasonably and act in good faith, but still disagree about whether to bargain nationally or locally. On the other hand, if one party insists on bargaining locally in an effort to avoid reaching an agreement, that party would be acting in bad faith, would not be exerting every reasonable effort, and could be compelled by a court under Section 2 First to bargain on a national handling basis.

Relying upon its interpretation of the relationship between Sections 2 First and 2 Third, the court stated (App. B at 21a-22a):

> If the parties were already engaged in national handling when this dispute arose, and the three General Committees refused to bargain further unless the carriers would negotiate local agreements, the situation might be different. However, here the dispute arose before any bargaining began. This Court finds that under these circumstances, where UTU and the General Committees have legitimately designated representatives under Section 2 Third and are not acting in bad faith, the RLA does not authorize the Court to dictate the conditions under which the parties must bargain before any bargaining has even begun.

On appeal, the court of appeals concluded that Section 2 Third, with its prohibition against interference with the designation of bargaining representatives, was not controlling, for the issue was the scope of that bargaining–*i.e.*, whether it was to be national or local. App. A at 5a. That issue, the court held, was governed by its 1967 decision in *Atlantic Coast Line*, which requires the district court to make

"'an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.'" App. A at 5a, *quoting Atlantic Coast Line*, 383 F.2d at 229. This requires the court to make an "objective assessment" of the parties' past bargaining practices. App. A at 5a. However, in this case the district court "departed from that test by applying a subjective good faith test arguably consistent with the Eighth Circuit's treatment of the issue in *Soo Line*, because it saw Section 2 Third as potentially inconsistent with a result applying Section 2 First under *Atlantic Coastline* [*sic*]." *Id.* Since the district court applied what was to the appellate court the wrong standard, the court of appeals vacated the district court's judgment and remanded for the district court to apply "the test of *Atlantic Coastline* [*sic*] and review[ ] objectively the bargaining history of the parties." App. A at 6a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A CONFLICT AMONG THE CIRCUITS ON IMPORTANT ISSUES CONCERNING THE PROPER INTERPRETATION OF THE RAILWAY LABOR ACT AND THE ROLE OF FEDERAL COURTS IN ENFORCING THE DUTY IMPOSED BY SECTION 2 FIRST OF THAT ACT "TO EXERT EVERY REASONABLE EFFORT TO MAKE AND MAINTAIN AGREEMENTS . . . ."

According to the court of appeals, this case presents a "relatively straightforward" issue: "when and under what circumstances may a carrier or union under the RLA [the Railway Labor Act, 45 U.S.C. § 151, *et seq.*] compel an opposing party to bargain on a national or local level, as chosen by the party seeking to compel the negotiations?" App. A at 3a. That issue, however, is anything but straightforward, for it raises the fundamental question

whether multi-employer bargaining may be compelled in the first place, and this, in turn, implicates two fundamental principles upon which the Railway Labor Act is premised; namely, the obligation that Section 2 First of the Act imposes on carriers and their employees "to exert every reasonable effort to make and maintain agreements" (45 U.S.C. § 152 First), and the protection that Section 2 Third of the Act gives the parties to designate their bargaining agent "without interference, influence, or coercion by either party over the designation of representatives by the other . . . ." 45 U.S.C. § 152 Third.

The proper interpretation of the relationship between these two provisions of the Railway Labor Act is clearly important to the administration of the Act itself. This Court has frequently described the duty imposed by Section 2 First as being the "heart" of the Act. *E.g.*, *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 574 (1971). And, it has held that the "[f]reedom of choice in the selection of representatives on each side of the dispute [which Section 2 Third guarantees] is the essential foundation of the statutory scheme." *Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 569 (1930).[10] Moreover, this Court has held that *both* statutory provisions may be enforced by the federal courts. *Chicago & North Western Ry.*, 402 U.S. at 577 ("[W]e think it plain that § 2 First was intended to be more than a

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[10] *Texas & New Orleans* involved the interpretation of § 2 Third as enacted by Congress in 1926. Railway Labor Act, § 2 Third, 44 Stat. 577, 578. Four years after *Texas & New Orleans* was decided, Congress amended the Act *inter alia* by providing that a majority of a craft or class may select the bargaining representative for the craft or class (§ 2 Fourth, 48 Stat. 1185, 1187), by providing that the National Mediation Board (NMB) was to resolve disputes *among employees* as to who their representative was (§ 2 Ninth, 48 Stat. at 1188-89), and by strengthening the prohibition in § 2 Third by adding that "neither party *shall in any way* interfere with, influence, or coerce the other in its choice of representatives." 48 Stat. at 1187 (emphasis added).

mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever means might be developed on a case-by-case basis"); *Texas & New Orleans R.R.*, 281 U.S. at 567-70 (Congress intended courts to enforce § 2 Third).

Section 2 First, as the court of appeals held in this case, is implicated because the request of one party that the other bargain "nationally," raises the questions, first, whether such bargaining is a "reasonable effort" and, second, whether a federal court may enforce Section 2 First by *compelling* that form of bargaining–*i.e.*, that "reasonable effort." On the other hand, as the Eighth and Sixth Circuits held in *ARASA v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *cert. denied*, 498 U.S. 809 (1990), and *UTU v. Grand Trunk Western R.R.*, 901 F.2d 489 (6th Cir.), *cert. denied*, 498 U.S. 815 (1990), Section 2 Third is also implicated. This is so because the goal of multi-employer bargaining is one agreement that applies to all [11] and this, in turn, requires that those participating in multi-employer negotiations designate a common bargaining agent–such as the NCCC, for the carriers, or the UTU's National Negotiating Committee for the participating General Committees.

Thus, as the Eighth and Sixth Circuits have recognized–but as the District of Columbia Circuit finds not to be controlling–the right which Section 2 Third gives each party to select its own bargaining agent means that Section 2 First cannot be used to compel one party to participate in multi-

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[11] *Delaware & Hudson Ry. v. UTU*, 450 F.2d 603, 611 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971) ("The obligation to bargain collectively may fairly comprehend a duty to bargain on a national handling basis, and to seek to reach a national agreement. . . . [T]he duty is to bargain in good faith, which means an absence of bad faith, and an effort to pursue single agreements [*i.e.*, an individual agreement with a party bargaining nationally] may be taken as undercutting an obligation to conduct national bargaining in good faith").

employer bargaining because to use the duty imposed by Section 2 First in that manner would require the party being compelled to bargain through an agent it has not selected, contrary to the guarantee that Section 2 Third provides to select bargaining agents without "interference, influence, or coercion" by the other party. *Soo Line*, 891 F.2d at 679 ("The railroad has a statutory right to designate its own representative; it has no obligation to accept national bargaining and is not bound by national negotiations in which it chooses not to participate"). This approach to the relationship between Sections 2 Third and 2 First, as the *Soo Line* court noted (891 F.2d at 678), is also consistent with the principles developed under the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.*, to govern multi-employer bargaining, which recognize the consensual nature of such bargaining. *E.g.*, *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982) ("The Board has recognized the voluntary nature of multiemployer bargaining. It neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining").

This underlying dispute over whether multi-employer bargaining may be obligatory is not of recent vintage, for it has occurred on various occasions for more than sixty years. *See* App. A at 4a. In its early annual reports, the National Mediation Board (NMB) frequently commented on the advantages to be obtained from national handling (*e.g.*, Third Annual Report of NMB at 2-3 (1937)), but in 1940 the NMB stated that: "However, as advantageous as is the handling of such disputes on a national or regional basis, the Board definitely ruled during the past year that it was not authorized under the act to require such handling on the part of either the carriers or their employees. This method can be effected only by the agreement or consent of the parties involved." Sixth Annual Report of NMB at 5 (1940).

This changed somewhat in 1967 when the District of Columbia Circuit decided *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968), in which the court stated (383 F.2d at 229):

> What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. . . .

This indicated that national handling could be obligatory *if*, under a Section 2 First analysis, it was found to be a reasonable effort.

Relying upon *Atlantic Coast Line*, rail labor sought to use Section 2 First to compel the Soo Line Railroad in 1988 to continue to bargain health and welfare issues nationally. However, the *Soo Line* court rejected the *Atlantic Coast Line* court's Section 2 First analysis because, the Eighth Circuit concluded, the controlling statutory provision was Section 2 Third with its protection of the designation of bargaining agents. 891 F.2d at 678 ("The unions' argument [relying on § 2 First] ignores the statutory right of each party to designate a representative with whom the other party's representative must negotiate"). The Eighth Circuit also explained that: "No . . . statutory provision obligates the railroad to designate a national, multi-carrier representative to conduct its negotiations." 891 F.2d at 678. As indicated above, the Sixth Circuit in *Grand Trunk* and the other courts which addressed this issue during the 1988 round of bargaining (*see* note 9, *supra*), agreed with the Eighth Circuit that the controlling statutory provision was Section 2 Third, not Section 2 First.

Soo Line and *Grand Trunk* did not resolve this dispute over whether multi-employer bargaining may be compelled, for when the next round of bargaining began in 1994,[12] the parties became involved in a race to the courthouse with those parties which wished to compel national handling (this time, the railroads) filing their suit in the District of Columbia, while those opposing national handling (several unions) sought to litigate this dispute in the Sixth and Eighth Circuits. *See Alton & Southern Ry. v. BMWE*, 1995 WL 338544 (D.D.C.) *1. The railroads won the race to the courthouse, but the ensuing litigation did not bring closure to the issue, for the parties settled their contract disputes before the dispute was heard by the court of appeals. *Alton & Southern Ry. v. BMWE*, 928 F.Supp. 7 (D.D.C. 1996), *appeal dismissed as moot*, D.C. Cir. No. 96-7104 (February 10, 1997). Instead, the *Alton & Southern* litigation intensified the dispute because the district court compelled national handling.

True to form, when the next round of bargaining began in 1999, the railroads once again raced to the courthouse in the only circuit favorable to the position they are currently espousing that national handling may be compelled. This time their request was rejected by the district court because it saw the dispositive statutory provision as being Section 2 Third. App. B at 20a ("[T]he identity of the representative and the

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[12] Collective bargaining agreements in the rail industry, in light of the Railway Labor Act's status quo obligation, generally do not have "duration" clauses; rather, the parties to recurring agreements, such as those dealing with rates of pay, normally include "moratorium" clauses by which the parties agree that, for the duration of the moratorium, neither will serve a notice under Section 6 of the Act to change any item resolved by that agreement or any other item that the parties agree to include within the scope of the moratorium. JA at 310, ¶ 6; 340, ¶ 6. The agreement resolving the round of bargaining that began in 1988 included a moratorium clause barring Section 6 notices on wages or rules prior to 1994, and the agreement concluding the 1994 round of bargaining barred such notices until November 1, 1999. JA at 318, ¶ 30; 350, ¶ 30.

structure of the bargaining cannot always be separated. In some cases, such as these, one necessarily effects the other"). However, on appeal the court of appeals rejected the district court's reliance on Section 2 Third, for the appellate court viewed the issue as being "the *scope* of bargaining (national or local)" (App. A at 5a; emphasis in original), which was to be decided by the Section 2 First analysis set forth in *Atlantic Coast Line*. This analysis, the court of appeals held, required the district court to make "an objective assessment" of the parties past bargaining practices to determine whether national handling was a reasonable effort that the court could compel the party opposing that form of bargaining "to exert." App. A at 5a.

Petitioners respectfully submit that the correct relationship between Sections 2 First and 2 Third–*i.e.*, the issue upon which the circuits are in conflict–presents an issue that is crucial to the proper administration of the Railway Labor Act and to the role of the federal courts in enforcing that Act. The underlying dispute over whether multi-carrier bargaining may be compelled has been raised during *each* round of bargaining since 1988. Now that the District of Columbia Circuit has reaffirmed *Atlantic Coast Line* and stressed that it requires the district court to make an "objective assessment" of the parties bargaining practices, it is clear that this dispute and the race to the courthouse will occur again and again until this Court resolves this dispute. In the interim, as occurred during the last three rounds of bargaining, bargaining will be delayed, contrary to the command of the Act that such disputes "be considered, and, if possible, decided with all expedition . . . ." 45 U.S.C. § 152 Second.

Moreover, until this dispute is resolved by this Court, a party involved in the bargaining where the parties desiring national handling win the race to the courthouse–*i.e.*, the courthouse in the District of Columbia–may be required to bargain through a bargaining agent it has not chosen and to

forego legitimate bargaining demands simply because the other parties bargaining through that agent do not consider those "local" issues to be important. Additionally, under the court of appeals interpretation of Section 2 First in this case, the district court for the District of Columbia will be required to make an "objective assessment" of the parties' past bargaining practices and may, based upon that assessment, compel multi-carrier bargaining, despite the fact that the parties being compelled, as in this case, "have not acted with a desire not to reach an agreement" and "are not driven by a desire to thwart the bargaining process." App. B at 21a. This allows a party to the bargaining to use the district court as a means to preclude the party opposing national handling from pressing to impasse legitimate, but parochial, bargaining demands, contrary to the admonition of this Court in *Chicago & North Western Ry. v. UTU*, 402 U.S. at 579, n. 11, that "great circumspection should be used [by federal courts in enforcing Section 2 First] in going beyond cases involving 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." It also gives the federal courts, in determining whether national handling is a "reasonable effort," the power to devise the ground rules for such bargaining under the Railway Labor Act, something that Congress has not authorized the courts to do under the NLRA (*e.g.*, *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. at 416-17), despite the greater role that Congress has given the federal courts under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), to develop federal law for suits enforcing collective bargaining agreements–a power which Congress has withheld from the courts for contracts under the Railway Labor Act.

Since most unions and major carriers subject to the Railway Labor Act operate in more than one circuit and are subject to suit throughout the United States, including, for

most, in the District of Columbia, the need for uniformity in the interpretation and application of this Act is extremely important. Where, as here, that uniformity is lacking, the parties will seek to involve the courts in their bargaining disputes, especially where, as here, one circuit holds itself out as being able to regulate the shape of the bargaining table.

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO RESOLVE THE DISPUTE OVER WHETHER MULTI-CARRIER BARGAINING MAY BE COMPELLED.

This case, petitioners submit, presents an excellent vehicle for this Court to resolve the dispute over the proper relationship between Sections 2 First and 2 Third and to determine the role of the federal courts when faced with a demand by one party that the court compel the other party to participate in multi-carrier bargaining. Here, the appellate court vacated the district court's judgment on cross-motions for summary judgment because, in the court of appeals' opinion, the district court had applied the wrong standard. This raises a purely legal issue concerning the proper relationship between Sections 2 First and 2 Third. It also presents the question whether the district court, on remand, may, because of its "objective assessment" of past bargaining practices, compel a party that clearly desires to reach an agreement to participate in bargaining in a forum where the party being compelled must designate a bargaining agent it has previously rejected and will be precluded from bargaining to impasse on bargaining demands that are important to it but not to the other parties represented by the bargaining agent it is being compelled to accept.[13]

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[13] Respondents have argued below that this case does not present the § 2 Third issue as in *Soo Line* or *Grand Trunk* because § 2 Third, when applied to the employee side of the bargaining table, protects only the right of employees to select their representative, and not the right of that

Although the court of appeals' decision does not explain in detail the reasoning it employed, the court clearly stated that, in its opinion, Section 2 Third was "not the governing provision" and that the issue before it was "the scope of bargaining–that is, whether it is locally or nationally handled–not the related but distinct question of designation of the bargaining representative." App. A at 5a. That issue, the court stated, was controlled by its earlier decision in *Atlantic Coast Line*. *Id*. Moreover, the court of appeals observed that the test set forth in *Atlantic Coast Line* requires the district court to make an "objective assessment" of the parties' past bargaining practices, and that this "was the interpretation [of *Atlantic Coast Line*] applied in *Alton and Southern* [928 F.Supp. 7] and, in our view, it is the correct one." App. A at 5a. Since the district court in *Alton & Southern* discussed in detail its interpretation of the relationship between Sections 2 First and 2 Third in explaining why the court was to make an objective assessment–and *not* look to the subjective good faith of the party opposing national handling–this Court has before it the rationale that the courts used to reach their conflicting positions. Additionally, since the record in this case shows without dispute that the three Committees "have not acted with a desire not to reach an agreement" but, rather, "have legitimate reasons for wanting to bargain locally and to

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representative to select its negotiator. That argument, petitioners submit is without merit. Section 2 Third expressly provides that the "[r]epresentatives of the employees . . . need not be persons in the employ of the carrier" (45 U.S.C. § 152 Third), and § 1 Sixth of the Act defines the term "representative" as "any person . . . designated by . . . employees, to act for . . . them." 45 U.S.C. § 151 Sixth. Thus, the term "representative" as used in § 2 Third obviously means not only the UTU but also the persons or entities that the UTU designates to bargain with the carrier–*i.e.*, the union's bargaining agent. In this case, the three Committees are bargaining agents and § 2 Third protects them from being "coerced" by respondents–or by a court–into ceding that bargaining authority to the bargaining agent the carriers would rather bargain with–the UTU's National Negotiating Committee.

reach individual agreements" (App. B at 21a), this case presents the issue that this Court left open in *Chicago & North Western Ry. v. UTU*, 402 U.S. at 579, n. 11, whether Section 2 First requires more of the parties than the avoidance of bad faith.

In *Alton & Southern*, the district court recognized that there was a need to examine the application of Section 2 Third to this dispute, but then stated that Section 2 Third could not be read as "trumping" Section 2 First as construed by *Atlantic Coast Line*. 928 F.Supp. at 15-16. Section 2 Third, the *Alton & Southern* court opined, was intended "to protect the identity of the representative, not the scope of his or her representation." 928 F.Supp. at 16. The latter question, the court stated, was to be determined by "an objective determination as to what is reasonable rather than the subjective standard proffered by" the union–which was the subjective good faith of the party opposing multi-carrier bargaining. 928 F.Supp. at 14. According to the *Alton & Southern* court: "To engage in a subjective analysis would transfer the dispositive determination [as to the scope of the bargaining] from the courts to the parties." *Id.*

With all due respect to the *Alton & Southern* court and to the court of appeals below, the "dispositive determination" as to the scope of the bargaining agent's authority belongs with the parties, *not* with the courts. To give that power to the federal courts–*where there is no showing of an attempt to avoid an agreement*–is to ignore the admonition of this Court in footnote 11 of its decision in *Chicago & North Western* and the principles of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, which govern the exercise of injunctive powers by federal courts in labor disputes. 402 U.S. at 583 ("Finally, the vagueness of the obligation under § 2 First could provide a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place").

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that the writ be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7068

GENERAL COMMITTEE OF ADJUSTMENT, GO-386, *et al.*,
Appellees,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellants.

Argued January 14, 2002 Decided July 19, 2002

Consolidated with
01-7069

Appeals from the United States District Court
for the District of Columbia
(No. 00cv00043)
(No. 99cv03117)

Before: SENTELLE and ROGERS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: This is an appeal from summary judgments entered in two separate actions consolidated by the District Court. *Burlington Northern and Santa Fe R.R. Co. v. United Transp. Union*, 141 F. Supp. 2d 49 (D.D.C. 2001). In District Court case No. 99-cv-3117, the Burlington Northern & Santa Fe Railroad Co., et al. (collectively "BNSF" or "the

carriers") sued the United Transportation Union and the International Brotherhood of Locomotive Engineers (collectively "UTU") seeking an injunction ordering the unions and subdivisions thereof to bargain with each plaintiff railroad on a craft-wide basis with respect to issues in the current round of bargaining. In District Court case No. 00-cv-0043, three "general committees of adjustment" of the UTU sued BNSF, et al., seeking a declaratory judgment of the right of the committees to decline to participate in multi-employer bargaining along with further declarations on related points. Each litigating side moved for summary judgments in both cases. The District Court entered summary judgment in favor of the UTU and against the carriers in both cases, ordering entry of final judgment against the carriers and, in an amended judgment, declaring that "general committees are the parties with whom the defendant [BNSF] must bargain." Because the District Court's application of law departed from binding Circuit precedent, specifically *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad*, 383 F.2d 225 (D.C. Cir. 1967), we vacate the judgments below and remand for further proceedings consistent with this opinion.

I. Background

Negotiations between carriers and their employees are governed by provisions of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1994 & Supp. V 1999) ("RLA" or "the Act"). Negotiations between them in the current controversy are part of a national "movement" in the railroad industry for changes in wages and other conditions of employment. Under the RLA, each party in collective bargaining is to designate a representative. 45 U.S.C. § 152 Third. The UTU is the designated representative of the crafts of conductors, trainmen, and firemen on each of the nation's major railroads, including BNSF. The UTU, by its constitution, includes within its organizational structure "committees of adjustment" authorized by the union constitution to deal with

grievances. The chairs or in some cases other representatives of local committees of adjustment are collected into "General Committees of Adjustment," which operate above the local level and "have authority to make and interpret agreements with representatives of transportation companies covering rates of pay, rules, or working conditions," UTU Const. art. 85. Eleven such General Committees represent BNSF employees. The three General Committees that are parties to this litigation announced their election to opt out of "national handling" of negotiations with all carriers and sought instead to "bargain locally" with BNSF.

BNSF insisted on national handling and refused to bargain separately with the General Committees. BNSF sued the union, seeking a declaratory judgment and compulsion of the union to bargain with it on a national level. The General Committees sued BNSF, seeking declaratory judgment and compulsion of the carrier to bargain with them separately. The District Court ordered the cases consolidated. The parties cross-moved for summary judgment. The District Court ruled in favor of the General Committees and against the carrier in both cases and entered judgment against BNSF. 141 F. Supp. 2d at 60. BNSF appealed.

II. Analysis

Although both parties submitted complex briefs and arguments in the District Court and before us, the issue is a relatively straightforward one: when and under what circumstances may a carrier or union under the RLA compel an opposing party to bargain on a national or local level, as chosen by the party seeking to compel the negotiations? Negotiations under the RLA historically have included both national and local negotiation. *See, e.g., American Railway and Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989); *Brotherhood of Railway Trainmen v. Atlantic Coastline Railroad*, 383 F.2d 225 (D.C. Cir. 1967); *Alton and Southern Railway Co. v. Brotherhood of Maintenance Way*

Employees, 928 F. Supp. 7 (D.D.C. 1996), *appeal dismissed as moot*, No. 96-7104 (D.C. Cir. Feb. 10, 1997). At various times and under various circumstances, unions and carriers have attempted to impose one method or the other on each other. *See, e.g., Soo Line*, 891 F.2d at 677-78 (union seeking to require national bargaining); *Atlantic Coastline*, 383 F.2d at 228 (carrier seeking to impose national handling); *Alton and Southern*, 928 F. Supp. at 20 (carrier seeking to impose "bargain[ing] on a multi-employer basis").

The District Court viewed the issue as involving "[t]he relationship between sections 2 First and Third" of the RLA. 141 F. Supp. 2d at 53 (citing 45 U.S.C. § 152 First and Third). Section 2 First makes it "the duty of all carriers . . . to exert every reasonable effort to make and maintain agreements . . . to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." Section 2 Third declares the right of representation and states that "[r]epresentatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives of the other. . . ." Because *Atlantic Coastline* had not addressed the question of bargaining methodology in terms of Section 2 Third, and because the District Court saw that subsection as governing the issue before it, the court concluded that *Atlantic Coastline* did not govern the issue. It therefore deemed the issue to be an open one in this Circuit, and ruled that the railroads were attempting to interfere with the selection of a bargaining representative by the employees. 141 F. Supp. 2d at 53. It further ruled that the General Committees were the designated representatives of the employees for Section 2 purposes and entered judgment in favor of the Committees. *Id.* at 58. The railroads, arguing that the union itself, not the Committees, was the certified representative of the employees, appealed.

Upon review, we conclude that Section 2 Third is not the governing provision. While the railroad is correct that the employees have designated the union as their representative, we further do not conclude that this fact by itself resolves this dispute. The union, by its constitution, does contemplate bargaining by the General Committees. Arguably, the contents of that constitution change nothing, but the relevance and weight of that particular fact is not yet ripe for decision. The issue before us, however, is the scope of bargaining—that is, whether it is locally or nationally handled—not the related but distinct question of designation of the bargaining representative. Thus, our decision in *Atlantic Coastline* provided governing precedent on the question before the District Court. Under *Atlantic Coastline*, the propriety of imposing national or local handling of bargaining issues is to be determined by "an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." *Atlantic Coastline*, 383 F.2d at 229. As the District Court in this case correctly understood, *Atlantic Coastline* has been interpreted "to mean that the court should make an objective assessment of the parties' past bargaining practices." 141 F. Supp. 2d at 56. This was the interpretation applied in *Alton and Southern*, and, in our view, it is the correct one. The District Court in the present case departed from that test by applying a subjective good faith test arguably consistent with the Eighth Circuit's treatment of the issue in *Soo Line*, because it saw Section 2 Third as potentially inconsistent with a result applying Section 2 First under *Atlantic Coastline*. But the recognition of designated representatives and the prohibition against interference with that designation under Section 2 Third do not control. Rather, the issue is the *scope* of bargaining (national or local). *Atlantic Coastline*, while relatively old, remains the law of this Circuit and "binds us, unless and until overturned by the court en banc or by Higher Authority." *Save Our Cumberland*

Mountains, Inc. v. Hodel, 826 F.2d 43, 54 (D.C. Cir. 1987) (Ginsburg, Ruth Bader, J., concurring). Therefore, rather than basing its determination on the subjective good faith of one of the parties, the District Court should have employed the test of *Atlantic Coastline* and reviewed objectively the bargaining history of the parties. Only after application of the *Atlantic Coastline* test should the court have determined whether there was no genuine issue of material fact, such that summary judgment was appropriate. As a result, we hold that the District Court improvidently applied a subjective test inconsistent with Circuit law.

Because the District Court decided this case on summary judgment we review *de novo* the issues before the District Court, and determine whether there is any genuine issue of material fact. *See, e.g., Atlas Air, Inc. v. Air Line Pilots Ass'n*, 232 F.3d 218, 222 (D.C. Cir. 2000). This review naturally entails our determining whether the District Court correctly identified and applied the governing law. Because the District Court did not apply the test under *Atlantic Coastline*, we hold that it did not properly apply the governing law. We therefore vacate the judgment below and remand the matter to the District Court. While theoretically we could determine *de novo* the question of the existence of genuine issues of material fact, in this case remand is appropriate rather than *de novo* determination, because the parties may make further submissions conforming to the *Atlantic Coastline* test. *Cf. Summers v. Department of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (declining to decide *de novo* summary judgment issues in a FOIA case involving extensive record review). On remand, we would remind the parties that in actions for declaratory judgment invoking the RLA, jurisdiction of the court is limited by general declaratory judgment law, and that a dispute appropriate for resolution under the declaratory judgment act "must not be nebu-

lous or contingent, but must have taken on fixed and final shape." *Atlas Air*, 232 F.3d at 227 (quoting *Danville Tobacco Ass'n v. Freeman*, 351 F.2d 832, 833-34 (D.C. Cir. 1965)).

Conclusion

The judgment below is vacated and the case remanded to the District Court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

[Filed Mar. 28, 2001]

Civil Action No. 99-3117 (EGS)

BURLINGTON NORTHERN AND
SANTA FE RAILROAD CO., *et al.*,
Plaintiffs,

v.

UNITED TRANSPORTATION UNION, *et al*,
Defendants.

Civil Action No. 00-00043 (EGS)

GENERAL COMMITTEE OF ADJUSTMENT GO-386, *et al.*,
Plaintiffs,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILROAD CO., *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Burlington Northern and Santa Fe Railway Company (BNSF) is a common carrier as defined under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et. seq.* The National Carriers' Conference Committee (NCCC) represents BNSF and several other railroads in labor negotiations under the RLA. United Transportation Union (UTU) represents conductors, trainmen, firemen, and yardmasters employed by BNSF under the RLA for collective bargaining and other

matters. UTU is composed of 11 General Committees of Adjustment, authorized under UTU's constitution to make and interpret labor agreements with representatives from transportation companies.

II. PROCEDURAL HISTORY

NCCC sent a notice to UTU under Section 6 of the RLA proposing changes to rates of pay, rules, and working conditions embodied in various collective bargaining agreements with UTU. Three of the General Committees have asserted the right under the RLA to bargain with BNSF over the proposed changes. BNSF maintains that the General Committees do not have the right to bargain individually over the proposed changes, but must instead bargain through the national negotiators selected by other UTU General Committees around the country who have decided to bargain on a concerted basis.

BNSF and other carriers bargaining through NCCC filed suit against UTU seeking declaratory and injunctive relief to require the three General Committees that wish to bargain individually to bargain with BNSF and other NCCC-represented carriers on a national basis (through the national negotiators selected by UTU) and to require UTU to bargain on a craft-wide basis. (Civil Action No. 99-3117). The three General Committees then filed suit against BNSF and NCCC seeking declaratory and injunctive relief to prevent BNSF and NCCC from forcing a bargaining agent on the General Committees that they do not wish to select and to prevent BNSF from changing, through its bargaining with UTU's negotiators, the agreements that the three General Committees argue they are authorized to make and maintain. (Civil Action No. 00-0043). UTU, the three General Committees, and BNSF have all filed motions for summary judgment.

Since the filing of these lawsuits, UTU's national negotiators have commenced bargaining with BNSF on behalf of

all of the other General Committees and a tentative agreement has been reached. The three General Committees that are parties to these lawsuits did not participate in the bargaining.

III. DISCUSSION

A. Standard of Review for Cross Motions for Summary Judgment

Upon consideration of cross motions for summary judgment, the Court may grant such a motion if the moving party is entitled to judgment as a matter of law upon material facts that are not genuinely disputed. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Rhoads v. McFerran*, 517 F.2d 66, 67 (2d Cir.1975). The Court finds that the cross motions present no genuinely disputed material facts that would preclude a grant of summary judgment in this case.

B. Standing to Sue

The carriers argue that the Committees are without standing to object to national handling. They argue that if UTU is the rightful bargaining representative for the employees only UTU has a legal interest in this dispute. They assert that the Committees have no right to designate a bargaining representative and thus have suffered no injury capable of judicial redress. The carriers also argue that the Committees are not within the zone of interest protected by the RLA because the RLA's focus is to protect the carriers and the employees, not the Committees.

The carriers arguments are without merit. Under UTU's constitution, the Committees are the chosen representatives of the employees. Additionally, they have been authorized to make and maintain the specific scheduling agreements subject to change. They have a stake in whether national handling is found to be obligatory because it will severely

diminish their voices at the bargaining table. The Court finds that UTU and the Committees have standing to bring this lawsuit under the RLA.

C. The Railway Labor Act

Under the RLA, both the carriers and their employees have a duty to "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" in order to avoid any interruption to commerce. 45 U.S.C. § 152 First.[1] By giving notice pursuant to 45 U.S.C. § 156 ("Section 6 notice"), either party can propose a change in its agreement. The RLA protects the right of both the carriers and the employees to designate their own representatives for bargaining "without interference, influence, or coercion by either party over the designation of representatives by the other; . . ." 45 U.S.C. § 152 Third.[2] Freedom of choice in the selection of representatives by each side in a bargaining dispute is considered essential to the RLA's statutory scheme. *See Texas & New Orleans R.R. v. Brotherhood of Railway and Steamship Clerks,* 281 U.S. 548,

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[1] Section 2 First states: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First.

[2] Section 2 Third states: "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier." 45 U.S.C. § 152 Third.

569 (1930). The RLA defines the term "representative" to mean any person, union, or organization designated by a carrier or by its employees to act for it. 45 U.S.C. § 151.

The two main issues in these cases are: 1) who will represent the parties at the bargaining table, and 2) where will the bargaining take place-locally or through national handling.[3]

The main case in the D.C. Circuit addressing the issue of national handling is *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad,* 383 F.2d 225 (1967). However, this case did not address a party's right to choose its bargaining representative under Section 2 Third or the interplay between Sections 2 First and Third. In *Atlantic Coast Line,* the carriers argued that national handling is mandatory under the RLA; the union argued that national handling is never mandatory. The court rejected both arguments and instead adopted a more individualized approach. The court held: "What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national move-

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[3] National handling is a form of multi-employer bargaining by a group of carriers bargaining with a union or a group of unions for a single agreement that will apply to all those who participate in the bargaining. Rail carriers that wish to engage in national handling do so through NCCC. If a carrier wishes to bargain with other carriers it authorizes NCCC to bargain on its behalf. Unions also have procedures to enable their constituent parts to bargain together. Under UTU's constitution, the General Chairpersons of the Committees that represent different groups of employees can form a "concerted movement."

ments." *Atlantic Coast Line,* 383 F.2d at 229. The court went on to find that based on the history and circumstances presented in the case, national handling was not required.

The relationship between Sections 2 First and Third was addressed for the first time in this circuit in *Alton & Southern Railway v. Brotherhood of Maintenance Way Employees,* 928 F.Supp. 7 (D.D.C.1996).[4] In that case, the district court found

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[4] In many ways, this case was similar to the cases presently before the Court. The plaintiffs were a group of rail carriers. The defendant was a union representing workers employed by the carriers. The carriers designated NCCC to act as their national multi-employer bargaining representative in negotiations with the unions, including BMWE. BMWE wanted to bargain locally with individual carriers. The carriers sought declaratory judgment obligating the union to bargain on a national handling basis with NCCC. BMWE and its individual General Chairmen sought declaratory judgment that it was not obligated to participate in multi-employer bargaining and that the carriers' insistence on multi-employer bargaining interfered with BMWE's right to designate its bargaining representative. Although other circuits have come to different conclusions regarding compulsory multi-employer bargaining, the district court applied *Atlantic Coast Line.*

The carriers argued that the facts of the case made national handling obligatory under the RLA. BMWE argued that as long as its desire to bargain locally was reasonable and not taken in bad faith, the court could not disturb it. BMWE reasoned that under *Atlantic Coast Line* the court's role was limited to assessing whether the decision to bargain locally was so unreasonable as to evidence bad faith. If the party was not acting in bad faith then Section 2 Third-prohibiting interference with a party's choice of bargaining representative-trumps the duty to exert every reasonable effort contained in Section 2 First.

The court rejected BMWE's argument and found that *Atlantic Coast Line* required the court to make an objective determination as to what is reasonable and appropriate based on how the parties actually bargained in the past.

The court then went on to analyze the Section 2 Third representation issue. However, the court applied *Atlantic Coast Line* notwithstanding the representation issue. The court was reluctant to allow the introduction of the representation issue to defeat national handling. The Opinion rea-

that *Atlantic Coast Line* required the court to make an objective determination as to what is reasonable and appropriate based on how the parties actually bargained in the past notwithstanding the representation issue. The court was reluctant to allow the introduction of the representation issue to defeat national handling. The court reasoned that if Section 2 Third could be used to defeat national handling, a party could always raise a representation issue in order to neutralize the holding of *Atlantic Coast Line* and prevent national handling from ever being imposed.

D. Parties' Arguments

1. UTU

UTU argues that it has the right to designate its own bargaining representative under Section 2 Third of the RLA. UTU argues that the district court's decision in *Alton* is distinguishable from the present cases based on its factual background. In *Alton,* the BMWE itself, as the designate under the RLA, had determined to bargain on a local handling basis. In the present case, UTU is engaged in national handling under its own constitution.

UTU's constitution permits subordinate General Committees of Adjustment to be excused from national handling and to exercise their own rights under UTU's constitution to bargain with their carrier. Under UTU's constitution and internal structure, any resolution by UTU and the carriers in national handling will not apply to those General Committees that wish to bargain individually. UTU argues that permitting

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soned that otherwise a party would always be able to raise a representation issue in order to neutralize the holding of *Atlantic Coast Line* and prevent national handling from ever being imposed.

The court held that Section 2 Third protects a union's right to name the representative of its choice, but does not entitle that party to dictate other aspects of the bargaining process.

the General Committees to bargain directly with their individual carriers even though UTU itself is in national handling is the exercise of the right to designate one's own representative under Section 2 Third. UTU asserts that since it is not acting in bad faith and is not trying to thwart the bargaining process, it is not in violation of Section 2 First.

2. General Committees

The General Committees argue that following the carriers' reading of *Atlantic Coast Line* would permit the federal courts to intrude into the collective bargaining process, contrary to the Supreme Court's decision in *Chicago & North Western Railway v. United Transportation Union,* 402 U.S. 570 (1971). In *Chicago & North Western,* decided after *Atlantic Coast Line,* the Supreme Court addressed the obligations of the parties under Section 2 First holding that a union's strike could be enjoined if it could be shown that the union did not try to reach an agreement in good faith. Thus, the Committees argue that the extent of the federal court's authority in enforcing Section 2 First is to determine whether the party is acting in bad faith. If the court determines that the party is not acting in bad faith, then the court's intrusion into the collective bargaining process must end. The Committees then argue that since they are not acting in bad faith, the inquiry into Section 2 First ends and Section 2 Third controls.

The Committees maintain that Section 2 Third controls where the party objecting to the designation of a national bargaining agent does so before bargaining begins—that a federal court cannot preclude legitimate bargaining proposals by one side before bargaining even begins.[5] If the decision to

[5] The Committees also point out that in *Atlantic Coast Line* the party seeking to avoid national handling served Section 6 notices on multiple carriers, but in this case, the party seeking to compel national handling served the Section 6 notice in an attempt to compel the other party's bargaining agent in violation of Section 2 Third.

object to national bargaining is not a legitimate bargaining proposal and is made in bad faith, then Section 2 First controls and prevents such action.

The Committees point out that while the question of the relationship between Section 2 First and Section 2 Third was not addressed in *Atlantic Coast Line,* it has arisen in two circuit courts and several district courts all of which concluded, with the exception of the district court in *Alton,* that Section 2 First did not limit Section 2 Third. These courts held that a party could object to national handling before negotiations began. *See, e.g., American Railway & Airway Supervisors Ass'n v. Soo Line R.R.,* 891 F.2d 675 (8th Cir.1989); *United Transportation Union v. Grand Trunk Western Railroad Co.,* 901 F.2d 489 (6th Cir.1990).

In *American Railway & Airway Supervisors Ass'n v. Soo Line R.R.,* the unions tried to force a railroad into national handling. 891 F.2d at 675. The railroad argued that Section 2 Third gave it the right to select its own representative to bargain on a local basis and not to be bound by any national agreement. The Eighth Circuit did not rely on *Atlantic Coast Line* and ultimately ruled in favor of the railroad by relying on Section 2 Third.

The Committees also argue that they should prevail even if the Court accepts the reasoning of the district court in *Alton.* In *Alton,* the court ruled that for Section 2 Third to be consistent with *Atlantic Coast Line,* Section 2 Third must be viewed as "intended to protect the *identity* of the representative, not the scope of his or her representation." 928 F.Supp. at 16 (emphasis added). Here, the Committees argue, it is the identity of their bargaining agent that is at issue.

The General Committees do not want UTU's national negotiators to bargain for them because it would diminish their influence in the negotiations. Under UTU's constitution, the three General Committees may participate in national handling only through UTU's national negotiating

committee acting as their bargaining agent. By participating in national handling through UTU, the Committees give up their right to decide on their own whether to accept or reject any proposed agreements.

Additionally, the Committees argue that it is the carriers that are in violation of Section 2 First by refusing to confer with them over the Section 6 notices as the carriers are not exerting every reasonable effort to settle the dispute.

3. The Carriers

The carriers argue that *Atlantic Coast Line* is the governing law in this circuit and that the Court is required to determine under the test set forth in *Atlantic Coast Line* whether national handling is obligatory in this circumstance. The carriers argue that the court in *Alton* correctly interpreted and applied *Atlantic Coast Line* and that the good faith test advocated by the General Committees should be rejected. Additionally, they argue that nothing in the Supreme Court's *Chicago & North Western* decision undercuts *Atlantic Coast Line* because in that decision the Court merely counseled the federal courts to exercise judicial restraint, but did not say it was improper for courts to find national handling obligatory.

The carriers argue that they prevail even if the Committees standard-that the parties can unilaterally withdraw from multi-employer bargaining prior to the start of negotiations absent bad faith-is applied.[6] The carriers argue that a union withdrawal from multi-employer bargaining must be total to be effective under *Pacific Coast Ass'n of Pulp & Paper Manufactures,* 163 N.L.R.B. 892 (1967).

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[6] Although it should be noted that the Committees are not attempting to withdrawal from multi-employer bargaining because at the time these lawsuits were filed, the bargaining had not yet begun, a distinction that the Committees argue is important.

Finally, the carriers argue that UTU cannot hide behind its own internal procedures and constitution because they do not supercede UTU's statutory duty under the RLA to engage in national handling. The carriers argue that UTU's constitution does not exempt the Committees from federal law. The carriers demand regarding national bargaining only concerns how bargaining is to take place, not who must participate.

E. Analysis

UTU is the duly designated bargaining representative under the RLA for the crafts and classes of firemen, conductors, and trainmen on BNSF. UTU operates in accordance with its constitution. Under UTU's constitution, each General Committee of Adjustment has autonomy over the negotiation and application of collective bargaining agreements that apply to the employees under that Committee's jurisdiction. For geographic and other reasons, the interests and concerns of some General Committees are different from those of other General Committees.

Under UTU's constitution, UTU has a national negotiating committee appointed by UTU's international president that carries out national handling on behalf of UTU. However, under Article 91 of the constitution, any General Committee that wants to opt out of national handling has the right to do so and to bargain individually.

The language of *Atlantic Coast Line* seems to lend itself, in some regards, to the objective type of analysis used by the district court in *Alton*. However, the decision in *Atlantic Coast Line* said relatively little about how to determine good faith and reasonableness or what standard should be applied. It does say, however, that what constitutes good faith depends on how the parties actually bargained in the past. The court in *Alton* interpreted this language to mean that the court should make an objective assessment of the parties past bargaining practices. However, the plain language could also

mean that the court should use the history of past bargaining between the parties to determine if one party is presently acting in bad faith.

Atlantic Coast Line must be interpreted in the context of subsequent Supreme Court precedent. Moreover, since *Atlantic Coast Line* did not address Section 2 Third of the RLA, this court must look to other judicial interpretations of Section 2 Third.

In *Chicago & Northwestern Railway*, decided three years after *Atlantic Coast Line,* the Supreme Court held that Section 2 First created an enforceable legal obligation on carriers and employees. This case dealt with whether federal courts could issue strike injunctions, rather than whether they could compel national handling. The Court stated that "the obligation under Section 2 First is central to the effective working of the Railway Labor Act. The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with 'a desire not to reach an agreement.'" *Chicago & Northwestern Railway*, 402 U.S. at 578. In a footnote the Court states that "great circumspection should be used in going beyond cases involving 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." *Id.* at 579 n. 11. The language of this case suggests that courts can and should look to the subjective intent of the parties when enforcing Section 2 First.

The district court in *Alton* was reluctant to look at reasonableness from each party's subjective perspective: "Parties could consistently come to court with diametrically opposed views of what was reasonable from their point of view, and likewise regularly disagree about their choices of a bargaining forum. To engage in a subjective analysis would transfer the dispositive determination from the courts to the parties." *Alton*, 928 F.Supp. at 14. However, Section 2 First is not

aimed at providing the courts with an avenue to control how bargaining will take place. Rather, Section 2 First addresses the behavior of the parties engaged in the bargaining process.

Section 2 First requires a party to "exert every reasonable effort to make and maintain agreements. . . ." 45 U.S.C. § 152 First. Both parties could behave reasonably and act in good faith, but still disagree about whether to bargain nationally or locally. On the other hand, if one party insists on bargaining locally in an effort to avoid reaching an agreement, that party would be acting in bad faith, would not be exerting every reasonable effort, and could be compelled by a court under Section 2 First to bargain on a national handling basis. In *Chicago & North Western,* the Supreme Court found that the courts are capable of making determinations about whether an action taken or omitted was in good faith. 402 U.S. at 579.

The analysis used by the district court in *Alton* diminishes Section 2 Third. The court rejected the notion that Section 2 Third protects both the right of a party to select the identity of its representative and the attached right to determine the structure of the collective bargaining, because such a reading would always allow a party to avoid national handling contrary to *Atlantic Coast Line.* In *Alton,* the court found that Section 2 Third only protects a party's right to select the identity of its representative. However, the identity of the representative and the structure of the bargaining cannot always be separated. In some cases, such as these, one necessarily effects the other.

In some respects the Section 2 Third issue is more squarely presented in these cases than it was in *Alton.* What is at issue in these cases is the employees' method, through UTU, of designating their own bargaining representative. The employees designate their representative through UTU's internal constitution. Section 2 Third protects a party's right to designate its representative without interference, influence, or

coercion. The carriers argue that this court should only be concerned with the United States Constitution, not UTU's constitution. However, UTU's constitution cannot be ignored. The employees choice to bargain through the General Committees-their choice of representative-is being challenged and it is UTU's constitution that provided the procedure and method for that choice.

These cases are also different from the previous cases in this circuit because the General Committees are not attempting to withdraw from national handling. Rather, in these cases, the dispute between the General Committees, UTU, and the carriers regarding who should bargain and how arose before any bargaining had begun. This is not a situation where one party is attempting to withdraw after national handling has begun. Several courts have found national handling to be obligatory *after* the parties had commenced national bargaining. However, this is not the scenario that is presented here.

The Court finds that UTU and the three General Committees have not acted in bad faith in violation of Section 2 First. They have not acted with a desire not to reach an agreement. UTU has followed its internal constitution and procedure for selecting its bargaining representative. Additionally, the three General Committees are not driven by a desire to thwart the bargaining process. Rather, the Committees have legitimate reasons for wanting to bargain locally and to reach individual agreements. The three General Committees have legitimate local issues that they feel will be ignored at the national bargaining table.

If the parties were already engaged in national handling when this dispute arose, and the three General Committees refused to bargain further unless the carriers would negotiate local agreements, the situation might be different. However, here the dispute arose before any bargaining began. This Court finds that under these circumstances, where UTU and

the General Committees have legitimately designated representatives under Section 2 Third and are not acting in bad faith, the RLA does not authorize the Court to dictate the conditions under which the parties must bargain before any bargaining has even begun.

F. System-wide, Craft-wide Bargaining

The carriers make the additional argument that employees under the RLA cannot insist on less than system-wide, craft-wide bargaining. They argue that UTU is the designated representative for BNSF's employees and thus speaks for the entire craft. The carriers argue that the National Mediation Board (NMB) has specifically held that UTU may not negotiate through its Committees, but rather must designate a representative with system-wide authority to bargain.

The carriers argue that the language of Section 2 Fourth-that the majority of any craft or class shall determine who "*the* representative" is-makes it clear there shall be a singular representative. 45 U.S.C. § 152 Fourth (emphasis added). The carriers assert that the Supreme Court in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), confirmed that there should be a singular representative by stating that the representative chosen by the majority of a craft represents the entire craft. The carriers argue that they are not interfering with the employees choice of representative, only that the representative chosen have authority to bargain for the entire class or craft.

The Committees argue that there is no requirement under the RLA that agreements apply system-wide. They point to the D.C. Circuit's decision in *Association of Flight Attendants, AFL-CIO v. USAir*, 24 F.3d 1432, 1437 (D.C.Cir. 1994), "that nothing in the RLA *per se* requires employees of the same craft or class in a particular system to be subject to the same terms and conditions of employment."

Additionally, the Committees argue that the NMB has no adjudicatory power and that it does not have the authority to determine the scope of bargaining under Section 2 First or who is a designated bargaining agent under Section 2 Third.

Finally, the Committees argue that the Section 6 notice proposes changes to the collective bargaining agreements that the Committees are designated and authorized to maintain. Those agreements are preserved by the Interstate Commerce Commission (ICC) to protect the interests of employees who were affected by the numerous mergers that have formed BNSF. The Committees assert that the merger orders of the ICC prevail when they conflict with other laws, such as the RLA. *Norfolk & Western Railway v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991).

The Seventh Circuit has held: "The language in Section 8 of the Employees Merger Protection Agreement to the effect that existing collective bargaining agreements can be changed in accordance with the procedures of the Railway Labor Act does not automatically render applicable the NMB's policy determination under the act that a class of craft bargaining unit must be system-wide in scope. Unless a representation determination is made pursuant to the Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a class or craft that is not system-wide will be given effect." *Burlington Northern v. American Railway Supervisors Ass'n*, 503 F.2d 58, 63 (7th Cir.1974).

The carriers are correct that the language of Sections 2 Fourth and Ninth suggests that there is to be a single representative. They are also correct that the NMB has determined that representation under the RLA must be on a system-wide, craft-wide basis. Additionally, the Supreme Court has held that the representative of a craft must represent all its members, not just the majority. *Steele*, 323 U.S. at 192.

The carriers' point to "Merger Procedures" promulgated by the NMB that allowed carriers to request a NMB investigation to determine the appropriate union representative. The board agreed that UTU should have a single representative for each system-wide craft or class, rather than the fractional representation of General Committees. *See Burlington Northern R.R.*, 18 N.M.B. 240 (1991). However, the D.C. Circuit held *en banc* that the NMB's Merger Procedures were invalid because the NMB had exceeded the scope of its authority under the RLA. *See Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C.Cir.1994) The NMB has no authority to determine the representative of a union when the issue is raised by a carrier. The carriers argue that because UTU withdrew from the appeal, the NMB's decision regarding UTU's General Committees still stands. However, the NMB's decision is certainly very weak authority given that the D.C. Circuit held that the NMB was acting without authority when it made this decision.

The Committees are correct that the RLA does not require that all the employees of the same craft or system be subject to the same terms of employment. *See USAir*, 24 F.3d at 1432. However, whether all the members of a certain class or craft must bargain together under one representative is a slightly different question. The Seventh Circuit case cited by the Committees is persuasive. This case suggests that under the circumstance presented in these cases, the RLA does not require that bargaining be craft-wide or system-wide. *See Burlington Northern*, 503 F.2d at 58.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant United Transportation Union's Motion for Summary Judgment in Civil Action No. 99-3117 is GRANTED. It is further

ORDERED that plaintiff Burlington Northern and Santa Fe Railway Company's Motion for Summary Judgment in Civil Action No. 99-3117 is DENIED. It is further

ORDERED that plaintiff General Committee of Adjustments' Motion for Summary Judgment in Civil Action No. 00-0043 is GRANTED. It is further

ORDERED that defendant Burlington Northern and Santa Fe Railway Company's Motion for Summary Judgment in Civil Action No. 00-0043 is DENIED. It is further

ORDERED that the Clerk shall enter final judgment for the defendant and against the plaintiff is Civil Action No. 99-3117. It is further

ORDERED that the Clerk shall enter final judgment for the plaintiff and against the defendant in Civil Action No. 00-0043.

IT IS SO ORDERED.

3/28/01
DATE

/s/ Emmet G. Sullivan
EMMET G. SULLIVAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Apr. 13, 2001]

Civil Action No. 1:00-CV-00043 (EGS)

GENERAL COMMITTEE OF ADJUSTMENT GO-386, *et al.*,
Plaintiffs,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY, *et al.*,
Defendants.

JUDGMENT

This Cause having been considered by the Court on cross motions for summary judgment, before the Honorable Emmet G. Sullivan, Judge presiding, and the issues having been duly briefed by all parties and the court having rendered its decision granting plaintiffs' motion; now therefore, pursuant to the decision of the Court, and as more fully set forth in said decision.

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff General Committees are the parties with whom defendant The Burlington Northern And Santa Fe Railway Company (BNSF) must bargain over the changes that defendant BNSF has proposed by its November 1, 1999 notice under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to agreements that the plaintiff General Committees have been designated to make and maintain;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff General Committees are not

acting in bad faith in violation of Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, by declining to bargain through the National Negotiating Committee of the United Transportation Union with defendant BNSF, or its designated bargaining agent, over those proposed changes;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the circumstances of this case, where, before bargaining began, the plaintiff General Committees legitimately declined to designate "national bargaining" representatives under Section 2 Third of the Railway Labor Act, 45 U.S.C. § 152 Third, and where, as declared above, the plaintiff General Committees are not acting in bad faith in seeking to bargain "locally" to reach individual agreements, the plaintiff General Committees are not violating the Railway Labor Act by declining to bargain with defendant BNSF, or its designated bargaining agent, in a multi-employer setting for a multi-employer agreement; and

IT IS FURTHER ORDERED that said plaintiffs have and recover costs from defendant BNSF.

DATE: 4/13/01

/s/ Emmet G. Sullivan
EMMET G. SULLIVAN
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Sep. 9, 2002]

No. 01-7068

GENERAL COMMITTEE OF ADJUSTMENT, GO-386, *et al.*,
Appellees,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY, *et al.*,
Appellants.

CONSOLIDATED WITH 01-7069

September Term, 2002
00-cv00043
99cv03117

Before: GINSBURG, *Chief Judge*, EDAWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND,* *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

ORDER

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Circuit Judge Garland did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

APPENDIX E

STATUTES INVOLVED

Section 1 Sixth of the Railway Labor Act, 45 U.S.C. § 151 sixth, provides as follows:

> The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, provides as follows:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2 Second of the Railway Labor Act, 45 U.S.C. § 152 Second, provides as follows:

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute

Section 2 Third of the Railway Labor Act, 45 U.S.C. § 152 Third, provides as follows:

> Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the

> designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Section 6 of the Railway Labor Act, 45 U.S.C. § 156, provides as follows:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Supreme Court U.S.
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No. 02-905

IN THE

Supreme Court of the United States

GENERAL COMMITTEES OF ADJUSTMENT GO-386 AND GO-245 OF THE UNITED TRANSPORTATION UNION,

AND

UNITED TRANSPORTATION UNION,

Petitioners,

v.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, *et al.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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January 13, 2003

80 pp

QUESTION PRESENTED

The question presented is whether, as the court of appeals held, the right under Section 2 Third of the Railway Labor Act to designate a collective bargaining representative without interference by an opposing party is irrelevant to determining whether a rail union must engage in bargaining with a multi-carrier group as a "reasonable effort to make and maintain agreements" under Section 2 First of the Act, and whether such a duty to bargain under Section 2 First can be limited by the union's own restrictions on its agent's authority to entertain the other side's proposals.

LIST OF PARTIES AND RULE 29 LIST

The parties to this proceeding are the petitioners United Transportation Union and its subordinate committees GO-386 and GO-245, and the following respondents (with parent companies and publically traded companies that own more than 10% of each respondent's stock):

1. The Burlington Northern and Santa Fe Railway Company

   Burlington Northern Santa Fe Corporation

2. Consolidated Rail Corporation

   Conrail, Inc.
   CSX Corporation
   Norfolk Southern Corporation

3. CSX Transportation, Inc.

   CSX Corporation

4. Kansas City Southern Railway Company

   Kansas City Southern Industries, Inc.

5. Norfolk Southern Railway Company

   Norfolk Southern Corporation

6. Union Pacific Railroad Company

   Union Pacific Corporation

7. Manufacturers Railway Company

   Busch Properties, Inc.
   Anheuser-Busch Companies, Inc.

8. Peoria & Pekin Railway Company

Conrail, Inc.
Consolidated Rail Corporation
CSX Corporation
Norfolk Southern Railway Company
Pennsylvania Lines LLC
Union Pacific Corporation

9. Portland Terminal Railroad Company

Burlington Northern Santa Fe Corporation
GATX Terminals Corporation
GATX Corporation
Union Pacific Corporation

10. Terminal Railroad Association of St. Louis

Burlington Northern Santa Fe Corporation
CSX Corporation
Canadian National Railroad
Illinois Central Railroad Company
Norfolk Southern Corporation
Union Pacific Corporation

11. Utah Railway Company

Arava Natural Resources Company, Inc.
Mueller Industries, Inc.

12. Winston-Salem Southbound Railway Company

CSXT Corporation
Norfolk Southern Railway Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

GENERAL COMMITTEES OF ADJUSTMENT GO-386 AND GO-245 OF THE UNITED TRANSPORTATION UNION,

AND

UNITED TRANSPORTATION UNION,

Petitioners,

v.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATUTE INVOLVED

Sections 2 First and 2 Third of the Railway Labor Act, 45 U.S.C. §§ 152 First, 152 Third, are quoted in Appendix E of the Petition.

STATEMENT OF THE CASE

This case is about collective bargaining in the freight railroad industry, which is governed by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. Railroads traditionally bargain with the rail unions on a multi-employer basis – a

process often called "national handling."[1] The issue here is whether requiring a union to engage in national handling as a "reasonable effort" under Section 2 First violates any representation rights it may have under Section 2 Third of the RLA.

The United Transportation Union ("UTU") is the designated representative of the crafts of conductors, trainmen and firemen on each of the nation's major railroads, including The Burlington Northern and Santa Fe Railway ("BNSF"). The UTU, through its constitution, has delegated its bargaining authority to a large number of subordinate "general committees," each of which purports to represent only fragments of these crafts on each railroad. The representational jurisdiction of these committees generally correlates to the geographic boundaries of former railroads that have long since been merged into larger systems. Pet. App. at 2a-3a, 18a.

In virtually every round of collective bargaining since the 1930s, the UTU and its predecessors have bargained with a coalition of freight railroads in national handling. The parties have almost always reached national agreements through this process. In the current round of bargaining, the railroads again proposed uniform changes to existing national agreements that cover all UTU-represented employees on the railroads in the multi-employer group. Pet. App. at 2a.

However, three UTU general committees – each claiming jurisdiction over only a portion of the UTU-represented employees on BNSF – refused to bargain alongside the rest of the UTU. Rather, each committee insisted on separate bargaining covering only a fraction of the employees of the railroad. As a result, the UTU and the committees disclaimed the authority to even discuss proposals that cover all UTU-represented employees of the multi-employer group. Nor would they discuss proposals covering all UTU-represented

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[1] The RLA specifically contemplates multi-employer bargaining. See 45 U.S.C. § 152 Second.

employees on BNSF. Pet. App. at 3a, 9a-10a.. Thus, the UTU is bargaining nationally for all employees except for those that these three BNSF General Committees purport to represent.

On November 24, 1999, the rail carriers sued the UTU in federal court in the District of Columbia, challenging this attempt to splinter negotiations. They contended that national handling is a "reasonable effort" required by Section 2 First of the RLA, 45 U.S.C. § 152 First, and the UTU is therefore obligated to bargain nationally for all the employees it represents in the multi-carrier group. The carriers relied on the D.C. Circuit's decision in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line Railroad*, 383 F.2d 225 (D.C. Cir. 1967), which held that whether national handling is obligatory is a fact-based inquiry requiring examination of, *inter alia*, the parties' historical experience with multi-employer bargaining. *Id.* at 229. The railroads also argued that, even if the UTU may refuse to bargain nationally, it may not balkanize the craft-wide bargaining units on an individual carrier, such as BNSF.

On January 7, 2000, the three dissident committees of the UTU ("the Committees") filed their own lawsuit against BNSF and its national bargaining agent, and the cases were consolidated. On March 28, 2001, the District Court granted summary judgment for the Petitioners and denied the railroads' cross-motion, holding that Section 2 Third of the RLA, 45 U.S.C. § 152 Third, permits the UTU to refuse to engage in multi-employer bargaining if it designates agents who lack authority to bargain over national issues and is not acting in bad faith in doing so. Pet. App. at 21a-22a.

On April 13, 2001, the District Court modified its grant of summary judgment to add a declaratory judgment that the "General Committees are the parties with whom defendant [BNSF] must bargain." Pet. App. at 26a. The railroads appealed.

The National Mediation Board – the federal agency that is charged with assisting collective bargaining in the rail and air industries – filed a brief as amicus curiae in support of the

Atlantic Coast Line approach to disputes about national handling and the craft-wide representation issue. The airline industry likewise filed an amicus brief in support of the railroads' position on craft-wide bargaining.

The Court of Appeals reversed the decision of the District Court. It noted that the issue presented is "a relatively straightforward one: when and under what circumstances may a carrier or union under the RLA compel an opposing party to bargain on a national or local level * * * ?" Pet. App. at 3a. On that issue, the Court of Appeals concluded that its earlier decision in *Atlantic Coast Line* was controlling. Thus, the District Court must decide whether national bargaining qualifies as a "reasonable effort" under Section 2 First by conducting "an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." *Id.* at 5a (quoting *Atlantic Coast Line*, 383 F.2d at 229).

The Court of Appeals further held that the union's choice of bargaining agent under Section 2 Third is not relevant to the analysis of whether national handling is a "reasonable effort." Rather, the issue here is "the scope of bargaining – that is, whether it is locally or nationally handled – not the related but distinct question of designation of the bargaining representative." Pet. App. at 5a.

The Court of Appeals declined to determine *de novo* whether there were disputed issues of fact under a proper application of the *Atlantic Coast Line* test. It remanded the case to the District Court for that purpose. *Id.* at 6a.

No member of the Court of Appeals requested a vote on the union's petition for rehearing *en banc*. Pet. App. at 28a.

REASONS FOR DENYING THE WRIT

The decision below does not raise any important issue of federal law that has not already been settled by this Court. Nor does it present a conflict among the circuits. Accordingly, the petition for certiorari should be denied.

I. THIS CASE CONCERNS ONLY THE APPLICATION OF WELL-SETTLED LAW TO SPECIFIC FACTS

A. Section 2 First is Applied On a Case-By-Case Basis

The basic duties of parties engaged in collective bargaining under the RLA are well established. Under Section 2 First, which is "[t]he heart of the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969), carriers and employees are required –

> "*to exert every reasonable effort to make and maintain agreements* concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier * * * ."

45 U.S.C. § 152 First (emphasis added).

What is a "reasonable effort" turns on the particular circumstances of each case. In *Chicago & North Western Railway* v. *United Transp. Union*, the Court ruled that the duty to "exert every reasonable effort" is "enforceable by whatever appropriate means might be developed on a case-by-case basis." 402 U.S. 570, 577 (1971). Quoting the principal draftsman of the RLA, the Court explained:

> "We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is

> more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America."

Id.

Accordingly, the lower courts have developed a substantial jurisprudence concerning the meaning of "every reasonable effort" in the context of particular circumstances.[2]

Atlantic Coast Line was one such case. There the D.C. Circuit faced the question "when and under what circumstances" parties in the railroad industry may be required to engage in multi-employer bargaining as a "reasonable effort" under Section 2 First. See Pet. App. A at 3a. The court concluded that this form of bargaining may be a "reasonable effort" – and therefore obligatory – if it has been used successfully during previous negotiations over the same kind of issues, such as wages or benefits. 383 F.2d at 229. It reasoned:

> "What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. *Whether it is*

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[2] E.g., *Association of Flight Attendants* v. *Horizon Air Industries*, 976 F.2d 541 (9th Cir. 1992); *REA Express* v. *BRAC*, 358 F. Supp. 760, 771 n.43 (S.D.N.Y. 1973) (collecting cases). The only bright-line rule is that a party may not refuse outright to discuss legitimate proposals made by the other side. See , *e.g.*, *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 548 (1937); *BLE* v. *Atchison, T. & S. F. Ry.*, 768 F.2d 914, 919 (7th Cir. 1985); *Piedmont Aviation* v. *ALPA*, 416, F.2d 633, 637 (4th Cir. 1969).

> *also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.*" *Id.* (emphasis added).

This analysis tracks the rules established by this Court with respect to the proper application of Section 2 First. In applying a context-specific, history-based approach, the Court of Appeals recognized that, if disputes over specific issues have been successfully resolved by national handling in the past, it is by definition a "reasonable effort" to engage in that method of bargaining again.

That is not to say that national handling is necessarily the only effort that may be required. It might, for example, be a reasonable effort to engage in "dual track" negotiations – simultaneous local and national bargaining. But it is surely not reasonable to reject absolutely methods of bargaining that railroads and unions used successfully for decades.

B. Section 2 Third is Not Relevant to the Question Whether a Rail Union May be Required to Engage in National Handling

Petitioners seek to escape the usual, fact-bound Section 2 First inquiry by arguing that their rights under Section 2 Third trump any obligation to bargain over proposals for a national agreement. Section 2 Third provides that "[r]epresentatives * * * shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other." 45 U.S.C. § 152 Third. According to Petitioners, this provision guarantees any subcommittee of a rail union the unfettered right to oppose national handling so that it may "press[] to impasse legitimate, but parochial, bargaining demands." Pet. at 17.

This argument is insubstantial and not worthy of review here. As the Court of Appeals correctly noted, Section 2 Third is about the identity of the bargaining agent, not the scope of bargaining (local or national or both) that may be required as a "reasonable effort" under Section 2 First. Pet. App. A. at 5a.

As explained in an earlier case raising this same argument during a similar dispute over national handling, Section 2 Third –

> "is intended to protect the identity of the representative, not the scope of his or her representation. * * * There is no indication in the language of the statute that suggests that it is intended to provide additional rights such as defining the bargaining form. The carriers have not interfered with the [union]'s right to name any individual as its bargaining representative. Whether there is a basis in the RLA for avoiding multi-employer bargaining or national handling, it does not arise from § 2 Third." *Alton & Southern Ry.* v. *BMWE*, 928 F. Supp. 7, 16 (D.D.C. 1996) (citation omitted).

Under this reading of Section 2 Third, the employees represented by the UTU are free to select anyone they want as their representative – including subordinate committees of the UTU – but those representatives must discuss the railroads' proposals in national bargaining when it is practically appropriate as a reasonable effort to reach agreement. This analysis reconciles the parties' rights under Section 2 Third with the parties' obligation to bargain under Section 2 First.

Nor does requiring national bargaining under Section 2 First indirectly force a party to choose a "national" bargaining agent or preclude bargaining over local issues. The employees' negotiators remain free to bargain for any kind of agreement they want. Carriers may seek nation-wide changes in agreements, but the employees can negotiate for local carve-

outs, special local rules, referral of issues to local handling, or anything else of that nature. National handling, if it is required, means only that the employees (and the railroads as well) must come to the table with negotiators authorized to reach *any* kind of agreement – local, national, or a hybrid – that the parties may ultimately decide is in their mutual best interest.

Thus, it is not true, as Petitioners suggest, that the approach used by the court below invites "freewheeling judicial interference" in the substantive terms of collective bargaining agreements. Pet. at 17, 20. The fact that national handling may be a "reasonable effort" in some circumstances says nothing about what the terms of the parties' agreements will be.

Under the Petitioners' approach, by contrast, it is impossible for the parties to negotiate about what the carriers propose, *i.e.*, an agreement that applies to *all* the carriers' employees represented by UTU. Indeed, Petitioners have even refused to try "dual track" local and national efforts to reach agreement. Thus, before negotiations even begin, Petitioners have ruled out any possibility of a national agreement. Even apart from the *Atlantic Coast Line* analysis, that is a clear violation of the most fundamental duty imposed by Section 2 First – the duty to at least discuss the other side's proposals. See *Virginian Ry.*, 300 U.S. at 548.

Setting aside the red herring of Section 2 Third, this case represents just another application of the approved case-by case approach to Section 2 First. There is nothing controversial about the lower court's approach or its conclusion that, under certain circumstances where history may point the way, the parties may be required to engage in national handling as part of their duty to make "every reasonable effort" to resolve disputes and reach agreement.

II. THERE IS NO CIRCUIT CONFLICT OVER THE RELATIONSHIP BETWEEN SECTION 2 FIRST AND SECTION 2 THIRD

The Sixth and Eighth Circuits have held that individual railroads cannot be compelled to choose a multi-employer bargaining agent. *United Transp. Union* v. *Grand Trunk W. R.R.*, 901 F.2d 489 (6th Cir. 1990); *ARASA* v. *Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989). These decisions, Petitioners claim, create a circuit split that should be resolved by this Court.

But the decisions of the Sixth and Eighth Circuits are distinguishable from *Atlantic Coast Line* and this case, for they dealt with the issue of compelling a party to *join* a bargaining coalition – not compelling a party to *negotiate with* such a group. See *Alton & Southern Ry.* v. *BMWE*, 883 F. Supp. 755, 762 n.7 (D.D.C. 1995). Both carriers and unions sometimes bargain in coalitions. There are multi-employer groups, and there are multi-union groups. See *Soo Line*, 891 F.2d at 676. The Sixth and Eighth Circuit decisions stand for the proposition that neither a carrier nor a union may be forced to join such a coalition. See *Id.* at 678-79; *Grand Trunk Western*, 901 F.2d at 490.

That rule and the result below live comfortably together. No one is suggesting that the UTU must join a coalition. Nor are the General Committees being coerced into a multi-union coalition. They are already part of the UTU, the designated representative of the employees, and so their obligation to participate in national handling is not the equivalent of forcing a carrier (or union) to join a larger group. Nor is the UTU being told it cannot use its General Committees as bargaining agents in national handling. Rather, the issue is whether the UTU (regardless of whether it bargains through the General Committees or not) must negotiate with the multi-employer group over the carriers' proposals for national agreements. That

has no impact on the employees' Section 2 Third rights – the UTU remains their duly designated representative.

In short, *Atlantic Coast Line* can readily be reconciled with *Soo Line* and *Grand Trunk*: Section 2 First may require a union to negotiate with a multi-employer group – or a carrier to negotiate with a multi-union group – but neither a carrier nor a union may be forced to join such a group.[3] Hence there is no circuit conflict for this Court to resolve.

III. THIS CASE IS NOT A "EXCELLENT VEHICLE" FOR REVIEW BY THIS COURT

Petitioners contend that, if the Court were inclined to reexamine the rules of collective bargaining under the RLA, this case is an "excellent vehicle" for doing so because it "raises a purely legal issue concerning the proper relationship between Sections 2 First and 2 Third." Pet. at 18. We have shown above that the interplay between those two statutory provisions is not unsettled and does not warrant review here. Moreover, at this stage the court of appeals has simply remanded the case to the district court for a determination whether, under the facts and circumstances of this case, national handling may be required. That determination may alter or even moot Petitioner's claims.

For example, the carriers contest the claim that the UTU and its Committees are operating in good faith. The record

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[3] At times during this litigation, Petitioners have argued that the carriers' interpretation of Section 2 First and Section 2 Third results in a one-way street – that unions may be forced into national handling, but carriers may not. In fact, the obligations are perfectly symmetrical. If the UTU joins a coalition of other unions, a railroad may not insist on negotiating with the UTU alone. Rather, the carrier can be forced to bargain with the multi-union coalition if, under *Chicago & North Western* and *Atlantic Coast Line*, it would be "practically appropriate" to do so.

facts show that the Committees refused to bargain with the carriers *at all* – in either local or national handling – which as discussed above is *per se* bad faith. See Joint Appendix ("J.A.") at 1025.[4] If the District Court were to conclude, for example, that Petitioners have refused outright to discuss the BNSF's proposals for craft-wide changes in agreements, then it need never reach the question whether national handling is obligatory under *Atlantic Coast Line*. Likewise, if the District Court decides that national handling is not "practically appropriate" in this case, then the matter would return to the Court of Appeals on the question whether the union may insist on bargaining for less than an entire craft on a single railroad system.

Finally, Petitioners exaggerate the frequency and scope of litigation over this issue. Prior to this case, there have been only a smattering of disputes about national handling over the course of the almost 70 years that carriers and their employees have been bargaining in this fashion. And despite the recent attempts by Petitioners to make national handling into a controversial process, in fact all of the recent previous rounds of bargaining have resulted in national agreements. Thus there is nothing about collective bargaining in the railroad industry that requires the Court's attention.

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[4] The Committees claimed that their refusal to bargain was justified because they had not been served with the carriers' written proposals. *Id.* They admitted, however, that the railroads sent them copies of the carriers' proposals, which is all that Section 6 of the RLA requires. *Id.* at 1021; 45 U.S.C. § 156.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

GENERAL COMMITTEES OF ADJUSTMENT GO-386 and GO-245 OF THE UNITED TRANSPORTATION UNION,

and

UNITED TRANSPORTATION UNION,

Petitioners,

v.

THE BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents, The Burlington Northern and Santa Fe Railway Company (BNSF), eleven (11) other railroads bargaining with the BNSF, and the Chairman of their bargaining group, the National Carriers' Conference Committee (NCCC), have filed a brief in opposition to this petition for a writ of certiorari. In their brief, respondents argue that this case does not raise an important issue of federal law that has not already been addressed by this Court, and that petitioners are wrong in asserting that there is a conflict among the circuits. Both arguments are without merit.

I. RESPONDENTS' ARGUMENT THAT THERE IS NOTHING CONTROVERSIAL ABOUT THE D.C. CIRCUIT'S RULING THAT A COURT MAY COMPEL MULTI-EMPLOYER BARGAINING IGNORES THE FACT THAT TWO OTHER CIRCUITS HAVE REJECTED THAT READING OF THE RLA. IT ALSO IGNORES THE FACT THAT, UNDER THE RLA'S SISTER LEGISLATION, THE NLRA, IT HAS LONG BEEN RECOGNIZED THAT MULTI-EMPLOYER BARGAINING IS CONSENSUAL FOR *BOTH* EMPLOYERS AND UNIONS.

Respondents contend that this case does not present important issues of federal law that have not already been settled by this Court, because, they assert, all that is involved here is the non-controversial application of the command in Section 2 First of the Railway Labor Act (RLA), 45 U.S.C. § 152 First, that the parties have a duty "to exert every reasonable effort to make and maintain agreements . . . ." This Court, their argument continues, has held that this duty is "enforceable by whatever appropriate means might be developed on a case-by-case basis" (*Chicago & North*

Western Ry. v. UTU, 402 U.S. 570, 577 (1971)) and the lower courts "have developed a substantial jurisprudence concerning the meaning of 'every reasonable effort' in the context of particular circumstances." Brief in Opp. at 6. They then conclude by asserting that "[t]here is nothing controversial about the lower court's approach or its conclusion that, under certain circumstances where history may point the way, the parties *may be required* to engage in national handling as part of their duty to make 'every reasonable effort' to resolve disputes and reach agreement." Brief in Opp. at 9 (emphasis added). That statement, petitioners submit, is patently erroneous, for what the D.C. Circuit has held in this case—*i.e.*, that multi-employer bargaining is *not* entirely consensual and may be compelled—is clearly controversial. It is a result that no other court has reached and two circuits have rejected. It is also contrary to the balance of similar competing interests that was struck by the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.*—and upheld by this Court—which recognizes the "voluntary nature of multiemployer bargaining." *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982).

When this case was before the D.C. Circuit, respondents solicited and obtained the participation of the National Mediation Board (NMB) as an *amicus curiae* before the Court of Appeals. In its brief, the NMB asserted that the decision of the district court in this case, which was consistent with the Sixth and Eighth Circuits decisions, "could have a substantial and adverse affect . . . on labor peace among those industries governed by the [Railway Labor] Act." Brief for United States as *Amicus Curiae* in D.C. Cir. Nos. 01-7068 & 01-7069, at 2. Now, having prevailed before that Circuit Court of Appeals, respondents no longer see the importance of the issues presented by this case, because, they contend, the D.C. Circuit's decision in this case involves nothing more

than "just another application of the approved case-by-case approach to Section 2 First" of the RLA. Brief in Opp. at 9. That contention, however, ignores the extraordinary nature of the result reached by the D.C. Circuit: In no other Circuit may a rail union or a railroad be compelled to participate in multi-employer bargaining. Moreover, in *no* Circuit, including in the D.C. Circuit, may a union or an employer subject to the NLRA be compelled to participate in multi-employer bargaining.

This latter point, petitioners submit, is especially significant here, for while the *scope* of the duty to bargain under the Railway Labor Act is *broader* than the comparable duty under the NLRA (*Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. 490, 508, n. 17 (1989) ("[E]nlarged scope of mandatory bargaining under the RLA")), both Acts are similar in that they do not provide for governmental regulation of the terms and conditions of employment.[1/] It is partly for this reason—*i.e.*, to protect the freedom to contract—that the courts in enforcing Section 2 First must use "great circumspection" in going beyond cases involving the "desire not to reach agreement." *Chicago & North Western Ry.*, 402 U.S. at 579, n.11.[2/] Thus, whether the D.C. Circuit

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[1/] *Compare, Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943) ("The Railway Labor Act . . . does not undertake governmental regulation of wages, hours, or working conditions as such"), *with*, *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) ("The object of this Act [NLRA] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions").

[2/] Respondents assert that "the lower courts have developed a substantial jurisprudence concerning the meaning of 'every reasonable effort' in the context of particular circumstances" (Brief in Opp. at 6) and they cite to various cases, the latest of which is *AFA v. Horizon Air Industries, Inc.*, 976 F.2d 541 (9th Cir. 1992). That case supports petitioners, for the Ninth Circuit emphasized the limited role of the federal

was correct in substituting an objective "reasonable effort" test for the subjective "good faith bargaining" test employed under the RLA since *Chicago & North Western Ry.*, is clearly an important issue that merits review by this Court.

Similarly, the need to protect freedom of contract is also an integral aspect of the reasoning that the NLRB employed when, in "balancing the conflicting legitimate interests" raised by multi-employer bargaining (*NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)), it concluded that multi-employer bargaining was voluntary. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 244 (1996) ("[C]onsent is automatically present whenever multiemployer bargaining takes place"); *Charles D. Bonanno Line Service, Inc. v. NLRB*, 454 U.S. at 413. Thus, for a court to rule that multi-employer bargaining may be *obligatory*, at the very least involves far more than "just another application of the approved case-by-case approach to Section 2 First." Brief in Opp. at 9. It surely justifies review by this Court to determine whether there should be, as respondents argue, such a significant difference between the two Acts.

Respondents attempt to sweep aside the controversial nature of the D.C. Circuit's decision by asserting that compelling a party to participate in multi-employer bargaining fits nicely into the jurisprudence developed under Section 2 First because in this case, "before negotiations even begin, Petitioners have ruled out any possibility of a national agreement." Brief in Opp. at 9. However, rather than showing that this case does not present unresolved, important issues of federal law, respondents' arguments once again highlight the importance of the issues raised by this petition.

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courts in enforcing § 2 First. 976 F.2d at 544-58, *quoting Regional Airline Pilots, Association v. Wings West Airlines, Inc.*, 915 F.2d 1399, 1402 (9th Cir. 1990) ("'the federal courts' obligation is to oversee the broad structure of the process and prevent major deviations, not to be involved in particulars of the bargaining process").

In this case, the district court concluded that respondents had not raised a genuine dispute of fact over whether the three Committees were acting with a desire *not* to reach an agreement in declining to participate in national handling. Pet. App. at 21a. As the district court explained (*Id.*):

> [T]he three General Committees are not driven by a desire to thwart the bargaining process. Rather, the Committees have legitimate reasons for wanting to bargain locally and to reach individual agreements. The three General Committees have legitimate local issues that they feel will be ignored at the national bargaining table.

Since the Committees were not acting with a "desire not to reach an agreement" in declining to participate in national handling, the district court concluded that the Committees had not violated Section 2 First. As the Ninth Circuit's decision in *Horizon Air* shows, that reading of Section 2 First is consistent with the substantial jurisprudence concerning Section 2 First that has been developed since *Chicago & North Western*. However, according to the D.C. Circuit, it is not the *proper* interpretation of Section 2 First, because the trial court should substitute its own conclusion of what is "reasonable" for the determination by a party as to the form of agreement that is in its own best interests. This, however, is where the conflict lies between the D.C. Circuit's approach to national handling and the approach taken by the Eighth and Sixth Circuits.

By centering on solely whether multi-employer bargaining may be a "reasonable effort" under Section 2 First, the D.C. Circuit ignores the other competing interests that are implicated by this question, such as the impact that engaging in national handling will have on the Committees' right to accept or reject the outcome of the bargaining. The three Committees may legitimately desire to resolve "local" issues, but being required to bargain nationally will preclude them

from insisting that those local issues be resolved before the group enters into a national agreement. This is so because the object of multi-employer bargaining, as respondents acknowledge, is a "national agreement"—*i.e.*, one agreement that applies to all—and this in turn means that a party to such bargaining may not bargain to impasse over issues that pertain only to it.[3/] Thus, under the D.C. Circuit's approach, a federal court, by compelling a party to bargain nationally, may limit the party's ability to obtain through that bargaining contract terms that are important to it.

On the other hand, under the approach taken by the Eighth and Sixth Circuits, which looks to the right given by Section 2 Third of the RLA to designate bargaining agents, the courts give meaning to the party's freedom of contract, because they allow the bargaining agent designated by the interested party to decide whether to accept or to reject proposed contract terms. According to the Eighth Circuit, nothing in Section 2 First requires the party opposing multi-employer bargaining to cede its bargaining authority to the group. *ARASA v. Soo Line R.R.*, 891 F.2d 675, 678 (8th Cir. 1989), *cert. denied*, 498 U.S. 809 (1990) ("[n]o . . . statutory provision obligates the railroad to designate a national, multi-carrier representative to conduct its negotiations"); *see also, UTU v. Grand Trunk Western R.R.*, 901 F.2d 489, 490 (6th Cir.), *cert. denied*, 498 U.S. 815 (1990). This result is entirely consistent with the principles developed under the NLRA for multi-employer bargaining. *Brown v. Pro Football, Inc.*, 518 U.S. at 244-45.

[3/] Respondents attempt to discount this limitation by arguing that the parties may bargain about local issues in national bargaining. Brief in Opp. at 8-9. That is correct, but it only highlights the problem, for even though local issues may be discussed, the party interested in those issues may not bring them to "closure"—*i.e.*, bargain them to impasse. *Delaware & Hudson Ry. v. UTU*, 450 F.2d 603, 611 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971).

In short, whether the D.C. Circuit's approach to multi-employer bargaining, or the reasoning of the Eighth and Sixth Circuits, is correct, presents an important issue of federal law that this Court has not resolved under the RLA.

II. RESPONDENTS' ARGUMENT THAT THERE IS NO CIRCUIT CONFLICT OVER THE RELATIONSHIP BETWEEN SECTIONS 2 FIRST AND 2 THIRD, IGNORES THE FACT THAT BY INSISTING THAT THE UTU BARGAIN ON BEHALF OF THE COMMITTEES, RESPONDENTS ARE TRYING TO SELECT THE BARGAINING AGENT FOR THE COMMITTEES—WHICH VIOLATES SECTION 2 THIRD.

Respondents make two arguments as to why there is no conflict among the circuits, especially one that should be resolved by this Court. First, they argue that petitioners' contention that Section 2 Third of the RLA is applicable to this case, is a "red herring," for, according to respondents, "the employees represented by the UTU are free to select anyone they want as their representative—including subordinate committees of the UTU—but those representatives must discuss the railroads' proposals in national bargaining when it is practically appropriate as a reasonable effort to reach agreement." Brief in Opp. at 8. And second, respondents argue that there is no conflict between the D.C. Circuit's approach to national handling and the approach taken by the Eighth and Sixth Circuits, because, they contend, the Eighth and Sixth Circuit cases dealt with "compelling a party to *join* a bargaining coalition—not compelling a party to *negotiate with* such a group." Brief in Opp. at 10 (emphasis in original). Both arguments are without merit, for, as the Eighth Circuit observed in *ARASA v. Soo Line R.R.* about comparable arguments rail labor made in that case, the party seeking to compel multi-employer bargaining

acknowledges the right of the other party to designate its representatives, but then argues as if that right did not exist. 891 F.2d at 678 ("The railroad may bargain solely on its own behalf. The unions appear to concede this and yet continue to argue as if it is not so").

In this case, respondents claim that they are not interfering with the right of the employees to select their own bargaining representative because, they assert, all that they are insisting upon is that the negotiators whom the UTU sends to the bargaining table have the authority "to reach *any* kind of agreement—local, national, or a hybrid—that the parties may ultimately decide is in their mutual best interest." Brief in Opp. at 9 (emphasis in original). According to respondents, this demand does not implicate Section 2 Third. But, according to the Eighth Circuit, it does, for by insisting that the union's negotiators have the authority to reach a multi-employer agreement, respondents are touching upon the *authority* of the negotiators, which is an interest protected by Section 2 Third.

In other words, as has occurred here, by insisting that the negotiators have the authority to bargain for whatever agreement the railroads may propose as a group, respondents are claiming the right to select the union negotiator with whom they will bargain—which in this case, they assert, is the UTU's national negotiating committee for all issues common to the railroads bargaining as a group through the NCCC. This approach to Section 2 Third is consistent with the D.C. Circuit's decision, for that court adopted the reasoning of the district court in *Alton & Southern Ry. v. BMWE*, 928 F.Supp. 7, 16 (D.D.C. 1996), *appeal dismissed as moot*, D.C. Cir. No. 96-7140 (Feb. 10, 1997), that Section 2 Third "is intended to protect the identity of the representative, not the scope of his or her representation."

Petitioners, on the other hand, assert that the railroads, by insisting that the negotiator bargain on behalf of more

employees than the union is willing to include within the scope of the negotiator's authority, are interfering with the union's rights under Section 2 Third to select its bargaining agent. Looking to Section 2 Third to determine whether national handling obligatory is the approach taken by the Eighth and Sixth Circuits, but it conflicts directly with the reasoning of the D.C. Circuit that "Section 2 Third is not the governing [statutory] provision." Pet. App. at 5a. Thus, whether the D.C. Circuit's approach to this question is correct depends on whether the Eighth and Sixth Circuits were mistaken in holding that Section 2 Third protects a party from being required to share its bargaining authority with another and that Section 2 First does not trump that protection. *Soo Line R.R.*, 891 F.2d at 677-78 ("[W]e are aware of no decision [including *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968)] that construes this duty [imposed by § 2 First] to obligate the railroad to bargain for a national contract through a national representative. The unions' argument [that the Soo Line was required to bargain with the other railroads bargaining nationally for a national health and welfare agreement] ignores the statutory right of each party to designate a representative with whom the other party's representative must negotiate"). Thus, contrary to respondents' assertion, there is a conflict among the circuits.

Nor do respondents fare any better in their argument that there is not a circuit conflict because the Eighth and Sixth Circuit decisions dealt with the right of a railroad to refrain from joining a bargaining coalition, while the D.C. Circuit dealt with the entirely different question of the obligation of a union to bargain with railroads on which it represents employees. According to respondents, requiring a union, such as the UTU, which represents employees on several railroads to bargain with a coalition of those railroads does not impact the *employees'* Section 2 Third rights because the UTU

remains their duly designated representative. Brief in Opp. at 10-11. This argument, however, is without merit, for respondents read Section 2 Third too narrowly and fail to give effect to the Eighth Circuit's admonition in *Soo Line* that "the right to designate a representative applies equally to both sides of the negotiating table; each side is obligated to 'treat' with the other's designee." 891 F.2d at 679.

Section 2 Third deals with the selection of the actual negotiators, whereas it is Section 2 Fourth of the RLA which provides the "right" that respondents attempt to read into Section 2 Third—*i.e.*, the right of the "majority of any craft or class of employees . . . to determine who shall be the representative of the craft or class for the purposes of this Act." 45 U.S.C. § 152 Fourth. Just because employees of one railroad have selected a national union to represent their interests does not mean that they have authorized employees of another railroad to negotiate their contracts. They, through their designated representative, have to make that decision under Section 2 Third. The Eighth Circuit recognized that Section 2 Third protects the right of the employees to designate whomever they wish as their negotiator when it emphasized that Section 2 Third applied equally to both labor and management, and this approach to the symmetry of multi-employer bargaining is entirely consistent with the parallel development of that form of bargaining under the NLRA. *E.g.*, *Detroit Newspaper Publishers Association v. NLRB*, 372 F.2d 569 (6th Cir. 1967). But, more to the point, respondents' argument that there is no such symmetry under the RLA presents an issue that is worthy of review by this Court.

CONCLUSION

For the reasons set forth in the petition and herein, petitioners respectfully request that their petition be granted.

Respectfully submitted,

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